

ARKANSAS COURT OF APPEALS
NOT DESIGNATED FOR PUBLICATION
DIVISION IV

CA05-889

DELTA CONSOLIDATED
INDUSTRIES, INC and GAB ROBINS
NORTH AMERICA, INC.
APPELLANTS

MARCH 15, 2006

APPEAL FROM THE WORKERS'
COMPENSATION COMMISSION

[NO.F400912]

V.

MICHAEL NELSON

APPELLEE

AFFIRMED

ROBERT J. GLADWIN, Judge

This appeal follows the decision of the Workers' Compensation Commission (Commission) affirming and adopting the opinion of the Administrative Law Judge (ALJ). Appellants Delta Consolidated Industries, Inc. and GAB Robins North America, Inc., challenge the sufficiency of the evidence supporting the finding that appellee, Michael Nelson sustained a compensable injury to his right upper extremity caused by job activities that involved rapid repetitive motion. Appellants also allege that the ALJ and the Commission abandoned their roles as impartial finders of fact by interjecting their own theory of compensability and ignoring appellee's inability to meet his burden of proof. We affirm.

Appellee was in his mid-twenties when he began working for appellant in October 2000. As a welder, his job duties consisted primarily of welding metal toolboxes of various sizes using a wire welder. He worked on a production line lifting and pushing boxes and parts of boxes, of various weights and dimensions, as well as performing actual spot welds on each toolbox. Appellee assisted in producing between 350 to 450 toolboxes per day,

depending on the sizes of the boxes. In late September or early October 2003, appellee reported problems with his right elbow to representatives of his employer. Rather than providing immediate medical treatment, appellee was advised to soak his elbow in hot water and Epsom salts. His condition grew progressively worse, and after a couple of weeks, he was provided with an elbow brace. The brace did not provide him relief, and on October 27, 2003, he specifically requested medical treatment.

Appellee was taken to the company doctor, Dr. Michael Lack, who diagnosed his injury as lateral epicondylitis. Dr. Lack treated appellee with a Medrol Dosepak and permitted him to return to work using only his left hand. After the course of conservative treatment failed to provide any significant relief to appellee, Dr. Lack referred him to Dr. Jeffery Cole, an orthopedic surgeon in Memphis, Tennessee. Dr. Cole initially treated appellee with additional conservative methods through approximately January 6, 2004, at which time he scheduled appellee for surgery. The surgery was not performed due to appellants' denial of appellee's workers' compensation claim. Appellee continued working for appellants until March 17, 2004, at which time he was informed that there were no further light-duty jobs available and that he would either have to return to his regular job or take short-term disability. Between that date and the date of the hearing before the ALJ, appellee did not return to gainful employment.

Appellants initially accepted appellee's claim as compensable and paid for medical treatment through January 6, 2004. They subsequently controverted the claim in its entirety, maintaining that appellee's job duties did not involve rapid repetitive activities that could have caused a gradual onset injury to his right upper extremity. Appellee sought a hearing before an ALJ, who found that the injury was compensable. Appellants appealed the ALJ's August 18, 2004 decision to the full Commission on September 13, 2004, and the

Commission affirmed and adopted the decision of the ALJ in its opinion filed on June 21, 2005. Appellants filed a timely notice of appeal on July 6, 2005.

Typically, on appeal to this court, we review only the decision of the Commission, not that of the ALJ. *Daniels v. Affiliated Foods S. W.*, 70 Ark. App. 319, 17 S.W.3d 817 (2000). In this case, the Commission affirmed and adopted the ALJ's opinion as its own, which it is permitted to do under Arkansas law. *See Death & Perm. Total Disab. Trust Fund v. Branum*, 82 Ark. App. 338, 107 S.W.3d 876 (2003). Moreover, in so doing, the Commission makes the ALJ's findings and conclusions the findings and conclusions of the Commission. *Id.* Therefore, for purposes of our review, we consider both the ALJ's order and the Commission's majority order.

In reviewing a decision of the Workers' Compensation Commission, this court views the evidence and all reasonable inferences in the light most favorable to the findings of the Commission. *Magnet Cove Sch. Dist. v. Barnett*, 81 Ark. App. 11, 97 S.W.3d 909 (2003). These findings will be affirmed if supported by substantial evidence. *Id.* Substantial evidence is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion. *Id.*; *see also Wheeler Constr. Co. v. Armstrong*, 73 Ark. App. 146, 41 S.W.3d 822 (2001). The issue on appeal is not whether the appellate court might have reached a different result or whether the evidence would have supported a contrary finding; if reasonable minds could reach the Commission's conclusion, the appellate court must affirm its decision. *Linton v. Ark. Dep't of Correction*, 87 Ark. App. 263, __ S.W.3d __ (2004).

In making our review, we recognize that it is the function of the Commission to determine the credibility of witnesses and the weight to be given their testimony. *See Williams v. L & W Janitorial, Inc.*, 85 Ark. App. 1, 145 S.W.3d 383 (2004). Questions of weight and credibility are within the sole province of the Workers' Compensation Commission, which is not required to believe the testimony of the claimant or of any other

witness, but may accept and translate into findings of fact only those portions of the testimony it deems worthy of belief. *Cottage Café, Inc. v. Collette*, __ Ark. App. __, __ S.W.3d __ (Feb. 1, 2006). Once the Commission has made its decision on issues of credibility, the appellate court is bound by that decision. *Id.*

A compensable injury must be established by medical evidence supported by objective findings. Ark. Code Ann. § 11-9-102(4)(D). A claimant seeking workers' compensation benefits for a gradual-onset injury must prove by a preponderance of the evidence that: (1) the injury arose out of and in the course of his or her employment; (2) the injury caused internal or external physical harm to the body that required medical services or resulted in disability or death; (3) the injury was a major cause of the disability or need for treatment. Ark. Code Ann. § 11-9-102(4)(A)(ii) and (E)(ii). An injury caused by rapid repetitive motion, causing internal or external physical harm to the body, and arising out of and in the course of employment may be a compensable injury if it is also proven to be the major cause of the disability or need for treatment. *See* Ark. Code Ann. §§ 11-9-102(4)(A)(ii)(a) and (4)(E); *see also High Capacity Prods. v. Moore*, 61 Ark. App. 1, 962 S.W.2d 831 (1998). The determination of whether there is a causal connection between an injury and a disability is a question of fact for the Commission to determine. *Oak Grove Lumber Co. v. Highfill*, 62 Ark. App. 42, 968 S.W.2d 637 (1998).

The definition of "rapid repetitive motion" has been expanded beyond an earlier definition that required the motions to be "exact, or almost exactly, the same movement again and again." *See Hapney v. Rheem Mfg. Co.*, 342 Ark. 11, 26 S.W.3d 777 (2000); *see also Baysinger v. Air Systems, Inc.*, 55 Ark. App. 174, 934 S.W.2d 230 (1996) (cited in *Malone v. Texarkana Pub. Schs.*, 333 Ark. 343, 969 S.W.2d 644 (1998)). *Malone* discusses that portion of *Baysinger* that refined the earlier definition "to include multiple tasks involving different movements which could be considered together to satisfy the repetitive element of

‘rapid repetitive motion.’” *Malone*, 333 Ark. at 349, 969 S.W.2d at 647. Our supreme court devised a two-part standard to determine whether an injury is caused by rapid and repetitive motion: (1) the tasks must be repetitive, and (2) the repetitive motion must be rapid. *Malone*, 333 Ark. at 350, 969 S.W.2d at 647. They further stated that “[a]s a threshold issue, the tasks must be repetitive, or the rapidity element is not reached. Arguably, even repetitive tasks and rapid work, standing alone, do not satisfy the definition. The repetitive tasks must be completed rapidly.” *Id.*, 969 S.W.2d at 647-48. In *Malone*, the supreme court held that a woman who worked as a custodian did not perform rapid repetitive motions, even though her job required numerous movements repeated many times in a day, because the movements were different and separated in time. *Id.*, 969 S.W.2d at 648.

During the hearing before the ALJ, appellee specifically alleged that he sustained a gradual onset injury to his right elbow that was caused by lifting and maneuvering the toolboxes that he helped produce. There was testimony given as to the weight of the various boxes, the mechanism used to lift the boxes, the number of boxes produced per day, and the amount of time spent lifting the boxes. Appellants contend that this case closely resembles *Jobe v. Wal-Mart Stores, Inc.*, 66 Ark. App. 114, 987 S.W.2d 764 (1999), where the Commission found that the duties were repetitive but not rapid and that the gradual onset injury was not compensable under Ark. Code Ann. § 11-9-102(4)(A)(ii)(a).¹ In the instant case, appellee worked with a partner to slide the toolboxes up rollers onto a platform, where the two men would spot weld between fourteen and sixty separate welds on each toolbox before sliding it on down the production line. There were incidents where appellee would finish his welds before his partner, thereby causing him to wait before proceeding. “Breaks” in the cycle also occurred when the next toolbox was delayed in reaching their station and

¹*Jobe* is distinguishable from the standpoint that there the parties stipulated that the job duties in question were not “rapid;” accordingly, compensability was denied. There was no such stipulation in the instant case.

when holes were blown in the metal with the welder. The latter circumstance required appellee to let the metal cool for at least thirty seconds before he could begin welding again. Appellants claim that the duties did not meet the criteria for rapid and repetitive. They also contend that a videotape submitted by them, which undisputedly reflected the exact type of work performed by appellee,² shows that there was time and opportunity for employees to consume beverages, wander around the job site, and move freely around both sides of the work station. As such, they contend that the duties performed by appellee could not meet the rapid and repetitive requirements.

Appellants' major contention is that the ALJ, and the Commission in affirming and adopting the ALJ's opinion, interjected their own theory of compensability that was not argued by appellee. The ALJ questioned appellee about his job duties and made a preliminary finding that the action of pulling the trigger on the welding gun approximately 5000 times per day, rather than lifting and moving the heavy toolboxes, had the potential for causing upper extremity problems. Appellants maintain that the ALJ was charged with finding more than "potential" when determining whether appellee had satisfied his burden of proof and that the ALJ's opinion was based upon speculation and conjecture. The appellants maintain that the ALJ determined the number of times that appellee squeezed the trigger of the welding gun solely through the questions he asked directly to appellee, and then attempted to support his findings by stating that the company doctor also concluded that the rapid and repetitive motion of pulling that trigger approximately 5000 times per shift caused the injury. Appellants claim that the medical records do not support this assertion. While they concede that medical evidence is not required to prove the cause of an injury was work-related, they reiterate that a claimant still must prove, among other things, a causal

²Appellee did state that he tended to work at a faster pace than the employee shown in the video. His supervisor conceded the pace on the video was slower than normal because one work-station was shut down.

relationship between his employment and the injury in order to prove its compensability. Because neither appellee nor his attorneys and physicians alleged that there was a relationship between pulling the trigger on the welding gun and the elbow injury, coupled with a complete lack of evidence as to the pressure needed to pull the trigger or other evidence as to how such an action could cause a similar injury, appellants contend there is no support for the Commission's decision.

In short, the appellants argue that the ALJ and the Commission were obligated to assess the case based upon the evidence and testimony presented at the hearing, not merely upon their own beliefs. *See Wright v. American Transp.*, 18 Ark. App. 18, 709 S.W.2d 107 (1986). Appellants contend that this case was decided on a theory that appellee and his attorney chose not to pursue. While they do not allege that an ALJ is forbidden to question a witness during a proceeding, they argue that he stepped beyond the appearance of neutrality and impartiality in this case. *See Riverside Marine Remanufacturers, Inc. v. Booth*, __ Ark. App. __, __ S.W.3d __ (Nov. 2, 2005). More importantly, they contend that the limited questioning posed by the ALJ to the appellee regarding his duties with the welding gun, in and of itself, does not suffice as substantial evidence. They argue that it was mere speculation and conjecture, which cannot substitute for credible evidence. *Smith v. City of Fort Smith*, 84 Ark. App. 430, 143 S.W.3d 593 (2004).

Appellants cite no case law that forbids the ALJ or Commission from using their own experience, logic, common sense, and independent judgment in deciding cases, and no such limitation exists. As appellee points out in his brief, his case relied upon *all* of his job duties regarding the production of the toolboxes, which included the actual welding as well as the lifting and moving of the boxes. The pre-hearing order filed on May 20, 2004, does not specify the exact theory of the cause of the injury but merely states that appellee sustained a gradual onset injury to his right upper extremity that arose out of and during the course of

his employment. This court has previously stated that multiple job tasks, when considered together, can satisfy the statutory requirements for gradual onset injuries. *See High Capacity Prods. v. Moore, supra*. Reasonable minds could reach the Commission's conclusion that the repetitive welding activities caused the injury and that the subsequent lifting and moving of the heavy boxes subsequently caused him the most pain due to the physical exertion required.

Appellants allege that appellee's job duties were interrupted by "frequent breaks" that were demonstrated by the videotape; however, they fail to define "frequent," relying only on the videotape footage as an example. Appellee counters that he had to work steadily to get the job done and meet the required "tack" times and that often there were welds that had to be redone. Normal breaks between periods of job duties do not defeat a finding of rapid and repetitive movements. *See Patterson v. Frito-Lay, Inc.*, 66 Ark. App. 159, 992 S.W.2d 130 (1999). The determination of whether there is a causal connection between an injury and a disability is a question of fact for the Commission to determine. *Oak Grove Lumber Co. v. Highfill, supra*. Dr. Lack's records are sufficient to establish the link or causation between appellee's various work duties and the injury, although medical evidence is not required. Those records in conjunction with the testimony constitute substantial evidence to support the Commission's decision.

Affirmed.

GRIFFEN and NEAL, JJ., agree.